U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-T-, INC.

DATE: APR. 22, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology services, seeks to permanently employ the Beneficiary as a software developer. It seeks classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition on May 5, 2015. The Director concluded that the record did not establish the Petitioner's intention to permanently employ the Beneficiary in the offered position.

The matter is now before us on appeal. The Petitioner asserts that the record establishes its intent to permanently employ the Beneficiary in the offered position. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A U.S. employer may sponsor a foreign national for lawful permanent residence, which is a three part process. First, the employer must obtain a labor certification, which the U.S. Department of Labor (DOL) processes. *See* 20 C.F.R. § 656, *et seq*. The labor certification states the position's job duties and the position's education, experience and other special requirements, along with the required proffered wage and work location(s). The beneficiary states and attests to his or her education and experience. The DOL's role in certifying the labor certification is set forth at section 212(a)(5)(A)(i) of the Act. The DOL's certification affirms that, "there are not sufficient [U.S.] workers who are able, willing, qualified" to perform the position offered where the beneficiary will be employed, and that employment of such beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." *See* Section 212(a)(5)(A)(i) of the Act.

Following labor certification approval, a petitioner files a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS) within the required 180 day labor certification validity period. *See* 20 C.F.R. § 656.30(b)(1); 8 C.F.R. § 204.5. USCIS then examines whether: the petitioner can establish its ability to pay the proffered wage, the petition meets the

requirements for the requested classification, and the beneficiary has the required education, training, and experience for the position offered. *See* Section 203(b)(3)(A)(ii) of the Act; 8 C.F.R. § 204.5.[1]

An employer "desiring and intending" to employ a foreign national in the United States may file an immigrant visa petition on his or her behalf. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). An employer must intend to employ a foreign national pursuant to the terms of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (upholding a petition's denial where a petitioner did not intend to employ the beneficiary as a live-in domestic worker pursuant to the terms of the accompanying labor certification).

For labor certification purposes, an employer must offer permanent, full-time employment and possess a valid, distinct federal employer identification number (FEIN). 20 C.F.R. § 656.3 (defining the terms "employer" and "employment" for labor certification purposes).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the petition. The labor certification identifies the Petitioner by name and FEIN as the Beneficiary's prospective employer in the offered position of software developer.

However, as indicated in the Director's decision, the record contains evidence that another company intends to employ the Beneficiary in the offered position. In May 2014, while the labor certification application was pending, another corporation acquired all of the Petitioner's capital stock. After the DOL approved the labor certification in the Petitioner's name, the Petitioner's new owner and parent company, which has a different FEIN than the Petitioner, filed a petition on behalf of the Beneficiary, stating its intention to permanently employ him in the offered position.

In support of the petition, the Petitioner's parent company submitted an undated letter from a human resources manager. The letter states that the Petitioner "has, or will shortly[,] cease to operate as an independent entity and its current operations and activities will continue to be conducted without interruption under [the parent company]."

The Director denied the parent company's petition, finding that the company did not establish itself as the Petitioner's "successor in interest" for immigration purposes. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986) (stating the circumstances under which a petitioner other than the employer listed on an accompanying labor certification may sponsor a beneficiary using the same labor certification).[2] After the petition's denial, the Petitioner submitted

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[1] In the final step, the beneficiary would file a Form I-485, Application to Adjustment State or Register Permanent Residence, either concurrently with the I-140 petition based on a current priority date, or following approval of an I-140 petition and a current priority date. *See* 8 C.F.R. § 245.

[2] USCIS records indicate that the parent company did not administratively appeal from the petition's denial. However, the company sought judicial review of the denial and ultimately agreed to the dismissal of its legal action. *See Innova*

the instant petition, asserting its own intention to permanently employ the Beneficiary in the offered position.

The Petitioner bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The Petitioner must establish by independent, objective evidence that it, and not its parent company, intends to employ the Beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Despite the instant petition stating the Petitioner's intention to employ the Beneficiary, the record suggests that he would actually work for the surviving parent company. However, the parent company cannot permanently employ the Beneficiary without filing its own labor certification application and subsequent petition on his behalf, or establishing itself as a successor in interest to the Petitioner. *See Dial Auto*, 19 I&N Dec. at 482.

As indicated in our notice of intent to dismiss/request for evidence (NOID/RFE) of December 29, 2015, the record contains additional evidence that the Petitioner's continued existence is only temporary and that it therefore does not intend to employ the Beneficiary permanently. The portion of the May 2014 purchase agreement provided by the Petitioner states the parent company's intention to continue the Petitioner's operations for only two years after the purchase. Section 3(e) of the agreement states:

> [The parent company] agrees that for a period of two (2) years it intends to continue the business of the [Petitioner] and carry out operations in the usual, regular and ordinary course, provided however that Revenues and EBIT [earnings before interest and tax] will be recognized in accordance with GAAP [generally accepted accounting principles] consistently applied.

The record also indicates that the Petitioner's most recent lease for office space expires on April 30, 2016. Thus, the record suggests that the Petitioner will cease independent operations by May 2016.

In response to our NOID/RFE, the Petitioner submits a March 23, 2016, letter from its "fulfillment head." Although the parent company initially intended to "absorb" the Petitioner's operations, the letter asserts that the parent company later changed its plans "for legitimate business reasons unrelated to immigration." The letter states: "In sum, we have no plans at this time to close [the Petitioner]."

The Petitioner also submits copies of recent tax records and business licenses as proof of its continued operations. It further submits copies of email messages from March 2016, in which one of its purported employees requested information from a property management company about renewing the Petitioner's office lease for another two years.

Solutions Inc. v. Hazuda, No. 5:14-cv-05492 (N.D. Cal. Feb. 10, 2015).

The record on appeal demonstrates the Petitioner's continued business operations. However, the record lacks independent, objective evidence establishing the Petitioner's intention to permanently employ the Beneficiary in the offered position. The Petitioner's letter stating its intention to operate for the foreseeable future carries little evidentiary weight where the corporation is owned entirely by its parent company. The record lacks any assurance from the parent company that the Petitioner will continue to exist.

The record also does not identify or explain the business reasons for which the parent company purportedly reconsidered its initial plans to close the Petitioner. The Petitioner cannot meet the burden of proof simply by claiming a fact to be true, without supporting documentary evidence. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376.

The Petitioner asserts that USCIS improperly bases the petition's denial on "speculation of future events." However, the record indicates the parent company's intention to close the Petitioner. As previously discussed, the letter from the parent company's human resources manager, the purchase agreement, and the Petitioner's current lease do not contemplate the Petitioner's existence beyond May 2016. Therefore, evidence of record, not mere speculation, supports the petition's denial.

The Petitioner also asserts that the petition's denial leaves it and the Beneficiary "in a state of limbo." The Petitioner states that, because it may be absorbed by its parent company in the near future, it cannot obtain an approved petition for the Beneficiary. On the other hand, it states that its parent company cannot successfully petition for him because USCIS does not recognize it as the Petitioner's successor in interest for immigration purposes.

However, the Petitioner or its parent company has the power to escape that "limbo." Upon submission of sufficient evidence of the Petitioner's intention to permanently employ the Beneficiary in the offered position, or of the parent company's successor relationship to the Petitioner for immigration purposes, a petition may be approved.

For the foregoing reasons, the record does not establish the Petitioner's intention to permanently employ the Beneficiary in the offered position pursuant to the terms of the accompanying labor certification. We will therefore affirm the Director's decision and dismiss the appeal.

The petition will be denied for the reasons state above. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-T-, Inc.*, ID# 15362 (AAO Apr. 22, 2016)